

Trials Without Rules – The Wild West of Arbitration



February 6, 2026

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Why is Arbitration “The Wild West?”

- No Rigid Adherence to Rules of Civil Procedure or Rules of Evidence
- Not Required to Follow Law
- The contract controls the proceedings
 - “[T]he parties are generally free to structure their arbitration agreements as they see fit, including specification of the rules under which the arbitration will be conducted.” *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 842 (Tex. App.—Fort Worth 2002, pet. denied).

Limited Appeal

- (1) the award was obtained by corruption, fraud, or other undue means
- (2) the rights of a party were prejudiced by:
 - (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
 - (B) corruption in an arbitrator; or
 - (C) misconduct or willful misbehavior of an arbitrator;

Limited Appeal

- 3) the arbitrators:
 - (A) exceeded their powers;
 - (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
 - (C) refused to hear evidence material to the controversy; or
 - (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or

Limited Appeal

- (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.

Limited Discovery

- Sec. 171.050. DEPOSITIONS. (a) The arbitrators may authorize a deposition...
- Sec. 171.051. SUBPOENAS. (a) The arbitrators, or an arbitrator at the direction of the arbitrators, may issue a subpoena for...

The Issue of Arbitrability

- Can be decided either by the court or the arbitrator, depending on the underlying contract. *TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694, 702 (Tex. 2023).
- Must show: 1) the existence of a valid arbitration agreement; and 2) that the claims at issue fall within the scope of that agreement. *Id.*
- There is a strong presumption in favor of arbitration under Federal and Texas law.

The Issue of Arbitrability

- Evaluated under state contract interpretation law.
- “Arising out of” v.s. “Related to”
- Courts can ultimately review an arbitrator’s arbitrability decision, but they must grant deference and only set the decision aside in “very unusual circumstances.”

Limited Discovery

■ Pre-Arbitration Discovery

- “[T]he Texas Arbitration Act authorizes pre-arbitration discovery only ‘when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability.’”

In re Copart, Inc., 619 S.W.3d 710, 713 (Tex. 2021).

Limited Discovery

■ Pre-Arbitration Discovery

- “Colorable Basis” Standard: “[A] trial court abuses its discretion in ordering pre-arbitration discovery when the requesting party presents no colorable basis or reason to believe that the discovery would be material in resolving any disputed issues of arbitrability.”

In re Copart, Inc., 619 S.W.3d 710, 714 (Tex. 2021).

Limited Discovery

- Pre-Arbitration Discovery
 - Challenging validity of the broader contract is insufficient. Must challenge that the arbitration agreement within the contract is itself not enforceable.
 - Why?: Severability
 - Consequence: Court will automatically enforce the arbitration agreement and require the arbitrator to decide the challenge to the broader contract.

“Splitting the Baby”: Is it a Myth?

- Deeply held belief by legal community for years
- Why?: Arbitration parties are often repeat customers
- Carter Greenbaum, *Putting the Baby to Rest: Dispelling a Common Arbitration Myth*, 26 Am. Rev. Int’l Arb. 101 (2015)
 - Used a random sample of more than 400 commercial arbitration awards
 - Found that the incidence of compromise awards was insignificant

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